

¹ On December 9, 2011, Claimant's mother sent, by facsimile transmission, a letter dated August 30, 2011, requesting preparation of the "summary of the hearing." The letter was marked for identification as Exhibit C on Claimant's behalf.

2. Was Regional Center's determination that Claimant was no longer eligible for services based on a "comprehensive reassessment" within the meaning of Welfare and Institutions Code section 4635.5, subdivision (b)?

FINDINGS OF FACT

1. Claimant was born on January 2, 1996. She was determined to be eligible to become client of Regional Center on March 16, 1999, based on a diagnosis of mild mental retardation. She had been a client of Regional Center, through the Early Start Program, since June of 1998.

2. Claimant was evaluated for Regional Center eligibility on December 7, 1998, by Frank J. Trankina, Ph.D. According to his report (Exhibit 1), Dr. Trankina administered Claimant several tests with the following results:

Peabody Picture Vocabulary Test 2-1

Mecham Verbal Language Developmental Scale 1-7

Beery Developmental Test of Visual Motor Integration 2-9

Stanford Binet Intelligence Scale, Fourth Edition
No meaningful basal possible

Stanford Binet Intelligence Scale, Form LM 2-2 IQ = 64

Vineland Adaptive Behavior Scales

Communication: 1-4

Daily Living Skills: 1-7

Socialization: 1-5

Motor Skills: 2-2

3. Dr. Trankina explained the results of his test as follows:

COMMUNICATION: On the Peabody, a measure of receptive word knowledge, Andrea placed at 2-years, 1-month. The Mecham is more a measure of expressive language and on this instrument Andrea placed at 1-year, 7-months. Report is that Andrea is not able to say her name. She is not able to relate experiences. Report is that vocabulary is under twenty-five words. Andrea does recognize the names of some objects in the home and she recognizes the names of some major body parts.

PSYCHOMOTOR FUNCTIONING: Andrea was able to imitate some of the basic designs of the Beery, placing at age level of 2-years, 9-months for fine motor integration. Gross motor skills are at 2-years, 2-months, as indicated by

the results on the Vineland. Andrea is able to go up and down stairs putting both feet on each step, and she has been learning to alternate feet. She is able to run well. She is able to jump. She is not able to peddle a tricycle. She is not able to hop on one foot. She is not able to cut with scissors using one hand.

INTELLECTLTAL FUNCTIONING: It was found that a meaningful basal would not be established on the Stanford Binet intelligence Scale, Fourth Edition. The Stanford Binet Intelligence Scale, Form LM was administered and Andrea was able to respond. Andrea placed at the mental age level of 2-years, 2-months. This results in an IQ score of 64, using the newer norms of the Stanford Binet, Form LM. This result is in the mild range of functioning. Andrea passed all items at the 2-year-old level with the use of a basal. She passed one regular item at the 2-1/2 year-old level and the alternate item; no items were passed beyond that level.

ADAPTIVE FUNCTIONING: The mother was the informant for the Vineland. Communication and motor skills are summarized above. Daily living skills are at 1-year, 7-months. Socialization is at 1-year-5-months. Overall there is significant delay in all adaptive areas.

Andrea is able to eat on her own using a spoon. She is not yet able to use a fork. She understands hot things are dangerous. She is not potty trained. Sometimes she might indicate when wet or soiled but not regularly. Andrea is fully dependent for all bathing and dressing.

During the evaluation and from a social point of view, Andrea was able to respond and cooperate with the testing. She is able to demonstrate interest in the activities of others. She is able to imitate simple adult movements such as waving goodbye. She is able to demonstrate desire to please caregiver.

5. Dr. Trankina diagnosed Claimant with mild mental retardation. He found that her adaptive functioning was “in the mild range” and that she had substantially handicapping conditions in learning, communication, self-care and self-direction. He recommended appropriate special education programming, speech therapy and “possible consideration for genetics consultation as desired.”²

6. On March 15, 2010, Regional Center sent Claimant a “Notice of Termination of Eligibility” of Regional Center services (Exhibit 5). The stated reason for the termination of services was that Claimant “does not have mental retardation.” In Exhibit 5, Regional Center stated that on March 10, 2010, an “interdisciplinary team met to decide if Andrea continues to be eligible for Regional Center services. The team decided that the original decision that made Andrea eligible for Regional Center services is clearly erroneous.”

² The evidence did not disclose the basis for Dr. Trankina’s reference to possible genetics consultation.

7. At the hearing, Regional Center offered no testimony nor did it present any expert opinion evidence. According to Ms. Martinez, the unidentified interdisciplinary team based its “reassessment” of Claimant on two documents from the Claimant’s school district, a psycho-educational evaluation dated May 2, 2001 (Exhibit 3) and a triennial psycho-educational evaluation dated May 10, 2007 (Exhibit 4.) Exhibit 4 contains numerous test scores Claimant achieved that Regional Center contends indicate she may not be mentally retarded. However, Regional Center did not offer any expert opinion evidence as to the meaning of the test scores, nor any evidence of more recent testing than 2007. The only other document Regional Center offered was Exhibit 7, an “Assessment of Progress toward Meeting IPP Objectives/ Outcomes,” dated August 31, 2009, prepared by Claimant’s Regional Center service coordinator. However, rather than dispute the original diagnosis of mental retardation, Exhibit 7, which is Regional Center’s most recent evaluation of Claimant, embraces the diagnosis of mental retardation and specifically states that the services and supports Claimant receives from Regional Center are appropriate and necessary.

8. Claimant’s mother testified and essentially confirmed the findings in Exhibit 7, which contains the most recent explication of Claimant’s deficits and achievements, both socially and educationally. The following is Exhibit 7 in its entirety.

1. Andrea continues to attend a regular education class placement at El Roble Middle School Claremont, Monday-Friday 8:00 a.m. to 2:30 p.m. Mother stated that she did well in 7" grade, but struggled with Math and World History. She is working at about grade level, but continues to receive Resource Specialist Program (RSP) services. She can multiply, divide, read chapter books and is able to write in complete sentences. She is learning Pre-Algebra. Mother stated that she has many friends and enjoys going to school. She is able to express herself in complete sentences, but sometimes mixes up her words. Her last IEP meeting was in 5/09. Mother did attend and reported being concerned with some of her academic progress. Mother stated that she hopes her 8' grade year will be more productive. The classes she will be taking are: USA History; English; Physical Science; Algebra 1; Spanish and a Regular P.E. class. She currently receives speech therapy 1 time per week for 30 minutes and RSP 4 times per week for 45 minutes. Objective continued.

2. Andrea is a 13 year old girl diagnosed with mild mental retardation. Mother stated that she has been in good health within the past year. In 2/09, she was seen by primary physician, Dr. Yu for allergies and a cough. Doctor did prescribe an antibiotic (name unavailable) for 5 days. In addition, Singulair 5 mg 1 tablet 1 time per day as needed for allergies. Mother also mentioned that she continues to suffer form constipation, but condition occurs less often than before. Mother stated that she is taking more fiber and has become more regular. She continues to have a good appetite and enjoys eating a variety of foods. Her last dental check up with new dentist, Dr. Takamatsu was in 6/09. She had her teeth cleaned, x-rays taken and no cavities were detected. In 7/09,

she had a check up with her Orthodontist (name unavailable). Her next scheduled appointment will be on 8/15/09. She does not receive any SSI benefits and has both health insurance through United Healthcare and Medi-Cal. Her current weight is 138 pounds and height is 59 inches. Objective continued.

3. Andrea enjoys being around other children. Mother informed SC that she has increased her social skills in the last 6 months. She has learned to make friends, temper tantrums have decreased and her verbal skills have increased. She is working on sharing and taking turns. Mother stated that she continues to fight with her siblings and often excludes her twin sister from activities. She is whiny, but is complaining less often than before. Mother did report being very satisfied with her increased social skills. Objective continued.

4. Mother stated that she would like to continue receiving information about developmental disabilities. Andrea's twin sister, Marieann is also a client of SGPRC. At this time, mother is not involved with a support group and has not attended a local conference for some time. Mother stated that she has been very busy and unable to attend any local support groups in her area. SC will continue to provide information about developmental disabilities as it becomes available. Objective continued.

5. Andrea's overall behavior has improved within the past year. Mother stated that she can be demanding, but whines and complains less often than before. She continues to fight with her siblings and can easily be frustrated with others. Mother informed SC that her emotional outbursts have decreased from 1 time per week to about 1-2 times per month. Mother also mentioned that she appears to be more tolerant of others and can be a good helper when she wants. Mother stated that she hopes that she will learn to get along better with her siblings. Objective continued.

6. Andrea requires some assistance in completing personal hygiene and bathing tasks. She is able to brush her teeth, take off and put on her clothes and is completely toilet trained. She also can bathe herself in the shower, but may need reminders to complete task. She also is unable to tie her shoes. She frequently is fighting with her siblings and has difficulty sharing and taking turns. She is aware of her surroundings. However, must be supervised within close proximity to monitor her activities. She displays emotional outbursts of crying and or yelling at least 1-2 times per month. SGPRC funded 36 hours per month of respite at the sibling rate of \$8.59 per, hour, through Accredited (parent choice) from 3/1/08 to 2/29/09. The service was reauthorized for a decreased amount of hours to 32 hours per month, at the sibling rate of \$8.69 per hour from 3/1/09 to 2/28/10. The decrease of hours reflects a 10% reduction in services with mother's consent. She does have Medi-Cal through

Institutional Deeming therefore does not have to be assessed for FCPP. Mother reported being very satisfied with services received from agency.
Objective continued.

Client family has been provided with information on ways to get involved in the system of services and supports for regional center clients (i.e. writing legislators, visiting legislators, registering to vote and voting, joining a support group, joining an advocacy group, attending a SGPRC Board or Committee meeting, joining a SGIPRC Board Committee, etc.) SC gave parent information about how to get more involved with The Regional Center.

SERVICES RENDERED BY SGPRC PURCHASE OF SERVICE (POS) SINCE LAST REPORT:

Client representative and RC agree that the service is appropriate, has been provided, and progress is being made to warrant continued [Purchase of Services]. Yes.
(Emphasis in original.)

9. Regional Center seeks to discontinue providing services to Claimant based on its determination that Claimant is not developmentally disabled within the meaning of Welfare and Institutions Code section 4512. In order for Regional Center to make a valid determination that Claimant is no longer entitled to services, it must actually conduct a “comprehensive reassessment.” Further, it must establish that the original eligibility determination was “clearly erroneous.” The “clearly erroneous” standard is very difficult to meet. In this case, Regional Center has not met this burden.

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (the Lanterman Act) is set forth in the Welfare and Institutions Code section 4500 et. seq.

2. Welfare and Institutions Code section 4643.5, subdivision (b) provides:

An individual who is determined by any regional center to have a developmental disability shall remain eligible for services from regional centers unless a regional center, following a comprehensive reassessment, concludes that the original determination that the individual has a developmental disability is clearly erroneous.

3. Based on the foregoing statute, before a regional center consumer can be found to be ineligible, he or she must be provided a comprehensive reassessment. While the term “comprehensive” is not defined, it would seem logical that a disqualification assessment ought to be as complete as that which resulted in the original qualification. In this case, no evidence was presented that Regional Center actually evaluated Claimant, nor that any

psychologist had examined Claimant since Dr. Trankina evaluated her 13 years ago. Additionally, under the above statute, a regional center challenging eligibility must show by “clear and convincing evidence” that, at the time the original eligibility determination was made, it was patently wrong.

4. This means the burden rests with Regional Center to offer proof that Claimant is not developmentally disabled, proof that is clear, explicit and unequivocal--so clear as to leave no substantial doubt and sufficiently strong to command the unhesitating assent of every reasonable mind. (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 594.)

Witkin explains the difference of this standard from the normal preponderance of the evidence:

In a few situations, for reasons of policy of the substantive law, the ordinary ‘preponderance of the evidence’ is not considered sufficient to establish the fact in issue, and instead the party must prove it by ‘clear and convincing evidence.’ In such cases, of course, the jury or trial judge should not be satisfied with a slight preponderance in favor of the plaintiff. [citations.] [¶] The phrase has been defined as ‘clear, explicit and unequivocal,’ ‘so clear as to leave no substantial doubt,’ and ‘sufficiently strong to command the unhesitating assent of every reasonable mind.’ [Citation.] Otherwise stated, a preponderance calls for probability, while clear and convincing proof demands a *high probability*. [Citations.]

5. Regional Center offered no expert testimony or opinions. While the Administrative Law Judge may use his specialized knowledge and experience in evaluating evidence (Government Code section 11425.50), a determination as to whether an individual is developmentally disabled is within the province of experts. (Evidence Cod section 801; *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1129.)

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Accordingly, Regional Center failed to meet its burden of establishing by clear and convincing evidence that Claimant is not entitled to remain a consumer of its services.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Claimant's appeal of Regional Center's determination that she is no longer eligible for services is granted. Regional Center shall continue to provide necessary services to her.

DATED: _____

RALPH B. DASH
Administrative Law Judge
Office of Administrative Hearings

NOTICE

THIS IS THE FINAL ADMINISTRATIVE DECISION IN THIS MATTER, AND BOTH PARTIES ARE BOUND BY IT. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN NINETY (90) DAYS OF THIS DECISION.